LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 9 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1966

NO. 1165

FISHEL RUDAWSKI, LIZA KAHANE, JACOB (RODAN) RUDAWSKI, JACOB TIMIANSKY and ZORAH TIMIANSKY,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

EARL FAIRCLOTH
Attorney General

SAM SPECTOR
Assistant Attorney General
Attorneys for State of Florida,
Respondent
The Capitol
Tallahassee, Florida

INDEX

	Page
STATEMENT OF THE CASE	1
JURISDICTION	4
QUESTION PRESENTED	4
REASONS FOR DENYING WRIT	5
CONCLUSION	9

CASES CITED

Page

In re Miller's Estate, 87 Wash. 69, 151 Pac. 105 8

Olmsted v. Olmsted, 216 U. S. 386 5

Wilkins v. Ellett, 9 Wall U. S. 740, 19 L. Ed. 586 6

OTHER AUTHORITIES

Section 734.25, Florida Statutes 2,6

United States Supreme Court Rule 19 4,9

20 Am. Jur., Evidence, Section 135, Page 140 8

28 USCA, Section 1652 8

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1966

NO. 1165

FISHEL RUDAWSKI, LIZA KAHANE, JACOB (RODAN) RUDAWSKI, JACOB TIMIANSKY and ZORAH TIMIANSKY,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

STATEMENT OF THE CASE

Jacob Tim, the decedent, died intestate on June 4, 1954, domiciled in and a long time resident of the State of Florida. Decedent's property consisted of intangible personalty and was physically located within the State of New York.

On July 9, 1954, domiciliary proceedings were commenced in Dade County, Florida, and an administrator was duly appointed pursuant to such proceedings.

The assets of the decedent, being substantial in amount and being located in the State of New York, a public administrator was appointed by the New York Surrogate.

Thereafter, on January 28, 1955, in a case pending before the Supreme Court of the State of New York, County of New York, a stipulation was entered into by the public administrator of New York, the New York administrator, the Florida administrator, and the J. T. Corporation. This stipulation was approved by said Court and had the effect of dividing the estate between the States of New York and Florida for administration purposes. (Petitioners' Appendix K)

Thereafter, another stipulation was entered into by both administrators, dated June 30, 1955, which said later stipulation was approved by both the Florida Probate Court and the New York Surrogate's Court. (Respondent's Appendix A, Page 1) By the terms of said stipulations, the assets of the decedent were divided and separate, and independent administration of such assets was agreed to.

Thereafter, proceedings to determine heirs and beneficiaries were held as to the divided assets in the respective states. The controlling statute in the Florida proceedings was Section 734.25, Florida Statutes. (Respondent's Appendix B, Page 8)

The Florida Probate Court found that none of the claimants before it, including petitioners in this cause, had established themselves as heirs who were entitled to decedent's estate. (Petitioners' Appendix H, Page 41)

In a parallel proceeding in the State of New York, the New York Surrogate, during the course of administration of the assets agreed to by the stipulations aforesaid to be administered in that State, held that the herein petitioners were heirs and thus entitled to take. (Petitioners' Appendix J, Page 48)

The New York order was dated December 21, 1956, while the Florida order was dated July 2, 1962.

The principal thrust of the petition herein is that the Florida courts should have given full faith and credit under the Federal Constitution to the earlier New York order holding that petitioners were heirs of the decedent. This contention is made in total disregard of the fact that the New York Court was not the court of the decedent's domicile; that the parties before the New York Court and the evidence submitted in the New York proceedings differed from the parties and evidence before the Florida Court; and, lastly, that the stipulations to which these petitioners were a party provided for separate and independent administrations of the decedent's divided assets.

JURISDICTION

United States Supreme Court Rule 19(1)(a) provides for review on writ of certiorari ". . . only where there are special and important reasons therefor." Matters indicated by said rule which will be considered by this Court are that a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court.

Petitioners have not demonstrated the existence of special and important reasons for the review being sought. The petition does not reflect that the State court has decided a federal question of substance nor has it been shown that the State court's decision was ". . . probably not in accord with applicable decisions of this court."

QUESTION PRESENTED

WHERE THE PROBATE COURTS OF TWO STATES BY STIPULATION AND AGREEMENT THEREFOR TAKE JURISDICTION OF A DECEDENT'S ASSETS FOR PURPOSES OF ADMINISTRATION AND THEREUPON ENTER FINAL ORDERS PURSUANT TO SEPARATE AND INDEPENDENT TRIALS ON THE MERITS, ARE SUCH FINAL ORDERS JUDGMENTS COMING WITHIN THE PURVIEW OF THE FULL FAITH

AND CREDIT CLAUSE AND THUS REQUIRED TO BE FOLLOWED BY THE COURT WHICH ENTERS ITS FINAL ORDER LAST IN POINT OF TIME?

REASONS FOR DENYING WRIT

This Court has held:

1. That judgments relating to the descent and distribution of property do not come within the purview of the Full Faith and Credit Clause of the Federal Constitution. *Olmsted v. Olmsted*, 216 U. S. 386. In so ruling, the Court at page 395 stated:

> ". . . We hold that there is nothing in the Federal Constitution requiring the courts of the State of New York to give force and effect to the statute of the state of Michigan so as to control the devolution of title to lands in New York."

The petition does not reflect that the Full Faith and Credit Clause of the Federal Constitution is applicable to the facts of this case. Not only is it the law that the administration of decedents' estates are solely within the jurisdiction of the domiciliary state, but the petition crassly ignores that the stipulations entered into by the petitioners contemplated separate and distinct administrations in Florida and New York of the decedent's divided assets. In its very essence, the petition asks this Court to regard the stipulations calling for separate and distinct administrations to be but the starting signal for

a "judicial foot race" between the New York and Florida courts in determining heirship to the decedent. The lack of soundness of such a result becomes readily apparent if the Court considers whether had the Florida order holding that the decedent had no heirs been entered first in point of time, then and in that event would the petitioners concede or urge that the New York Court, being hypothetically last in point of time, would then be bound by the Florida court's finding of no heirs.

2. The record reflects that Florida was the unquestioned domicile of the decedent. The Florida court held:

> ". . . Jacob Tim, the decedent, was for many years prior to his death domiciled in and a resident of the State of Florida. . . ." (Petitioners' Appendix H, Page 41)

The stipulations herein make it abundantly clear that it was the intent of the parties that the separate res placed in the possession of each of the administrators would be administered separately.

The Florida courts properly made the determination of heirship and distribution pursuant to Section 734.25, Florida Statutes. The Florida court action of independently making this determination is consistent with the principle adhered to by this Court in Wilkins v. Ellett, 9 Wall U. S. 740; 19 L. Ed. 586, in which the Court stated the following:

> "It has long been settled, and is a principle of universal jurisprudence in all civilized nations that the

> personal estate of the deceased is to be regarded, for purposes of succession and distribution, wherever situated, as having no other locality than that of his domicile; and if he dies intestate the succession is governed by the law of the place where he was domiciled at the time of his decease, and not by the conflicting laws of the various places where the property happened at the time to be situated. Citing 2 Kent Com. 429; Story, Conflict of Laws, Sec. 379."

3. It is manifest that the New York Court was governed by the laws and procedures of that State in deciding the question of heirship. The Florida Court in making its determination of the same issue was likewise governed by the law and procedure of the State of Florida. Different standards of law and procedure being applicable, it follows that the Full Faith and Credit Clause did not and could not apply.

4. The second ground upon which the petitioners seek review is that of deprivation of due process arising from the Florida Court's ruling on the issue of burden of proof. The Florida Supreme Court construing a Florida statute, Section 731.33, Florida Statutes, declared the law of the State of Florida respecting the proof required before the estate of a decedent may be escheated to the State. In so ruling the Court held (Petitioners' Appendix A, Page 4):

> "The burden of proving the existence of the state of facts upon which the statutory right to inherit depends should be upon the one asserting such statu-

tory right." Citing 20 Am. Jur., Evidence, Section 135, Page 140, and In re Miller's Estate, 87 Wash. 69, 151 Pac. 105, from which the Court quoted extensively.

The question decided by the Florida Supreme Court was a question of Florida law. That it was decided adversely to petitioners does not reflect deprivation of property without due process under law. Due process under law has never been known to guarantee that a litigant will prevail in an action. The statute which the Florida Supreme Court was called upon to construe was enacted by the Florida Legislature and the Florida Court is the sole authority to determine the meaning and application of the statute.

> "The laws of the several states, except where the constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply." (28 USCA, Section 1652)

The record at every level of the Florida judicial process reflects that every consideration and opportunity has been accorded the petitioners to establish their relationships to the decedent. The voluminous evidence presented to and considered by the trial judge on behalf of fifty-three claimants and the full and thorough investigation of the facts by court officers reflect diligence on the part of the Florida courts in arriving at the decision sought to be reviewed.

5. Petitioners' contention that the Florida Supreme Court acted arbitrarily and capriciously by misconstruing the opinions of the lower court is without basis. The reasons for denial of the writ hereinabove stated adequately demonstrate the absence of arbitrary and capricious action by the Florida Court.

CONCLUSION

For the reasons above stated, it is urged that the granting of the writ should be denied. Petitioners have failed to show that the decision in question involves importance to the public or that a genuine constitutional question is presented as required by United States Supreme Court Rule 19.

Respectfully submitted,

EARL FAIRCLOTH
Attorney General

SAM SPECTOR
Assistant Attorney General
Attorneys for State of Florida,
Respondent
The Capitol
Tallahassee, Florida

APPENDIX

INDEX TO APPENDIX

APPENDIX		Page
A.	Stipulation Dated June 30, 1955	App. 1
B.	Section 734.25, Florida Statutes	App. 10

APPENDIX A

SURROGATE'S COURT: COUNTY OF NEW YORK

In the Matter of the Application of the Public Administrator of the County of New York, as Administrator of the Goods, Chattels and Credits of

JACOB TIM,

Deceased,

To compromise and settle an action.

Subject to the approval of the following stipulation by the Surrogate of the County of New York and to the entry of an order of the County Judge's Court in and for Dade County, Florida, as set forth in paragraph "7" hereof, the undersigned hereby stipulate and agree that the application herein of the respondents, JACOB TIMIANSKY, ZORAH TIMIANSKY, LIZA KAHANE and FISHEL RUDAWSKI (hereinafter referred to as Respondents) for the issuance of a commission to take oral testimony in Israel of the persons named in paragraph 1 of respondents' notice of motion dated May 20, 1955, to wit: JACOB TIMIANSKY, ZORAH TIMIANSKY, LIZA KAHANE, FISHEL RUDAWSKI, DYNA GINSBURG, RACHEL CHWOINIK, DR. JONAS BULKOWSTEIN, A. LEVINSON, SIMHA FNINY, MOSHE CHMILEVSKI and AARON STAWSKY, and of such other persons as may be located in Israel by any of the parties (prior to the completion of the examination of the persons named in

said notice of motion) who may be able to give testimony relevant to the status of said respondents as distributees of JACOB TIM, deceased, be granted upon the following terms and conditions:

1. The taking of said depositions in Israel shall commence on the 29th day of August, 1955, unless an earlier date shall be agreed upon by the persons participating in the taking of said despositions.

2. Except as the parties may otherwise agree, all depositions shall be taken at the Hotel Dan, in Tel-Aviv, Israel.

3. The following persons shall participate in the taking of the depositions:

A. An attorney for the Public Administrator of the County of New York;

B. The Florida attorney for DAVID ELMER WARD, Administrator in the State of Florida of the Estate of JACOB TIM, deceased;

C. The New York attorney for DAVID ELMER WARD, the Florida Administrator of the Estate of JACOB TIM, deceased;

D. An attorney representing the respondents in the proceedings in the Surrogate's Court in the County of New York;

E. An attorney representing the respondents in the estate proceedings in the County Judge's Court in and for Dade County, Florida;

F. The Special Guardian for unknown distributees appointed by the Surrogate of New York County;

G. The Commissioner appointed by the Surrogate of New York County.

4. That the examination of such of the witnesses as do not speak the English language be conducted through an interpreter qualified to act as such in judicial proceedings in the courts of the State of Israel or through an interpreter agreed upon by the attorneys participating in the taking of the depositions.

5. The testimony of each witness shall be transcribed as soon after the taking thereof as possible, and a copy thereof given to each of the attorneys for the respective parties, and upon the completion of the transcript of the testimony of the last witness the respective transcripts shall be submitted to the witness for signing. At any time prior to the signing of the deposition by a witness any party shall have the right to recall such witness for the purpose of clarifying any testimony theretofore given by the witness or for the purpose of testifying regarding matters testified to by other witnesses after the initial examination of the witness in question. Any witness so recalled shall also be subject to further cross-examination.

5-a. The witnesses examined shall answer questions regardless of objections raised by any of the parties, it being understood that all objections made to questions asked, except as to form, and all motions made to strike answers shall be deemed reserved for ruling at the hearing or trial, if any, wherein the deposition of the witness may be used, in New York or Florida, as the case may be.

5-b. The parties hereto agree that in the event that any party shall for any reason, except as hereinafter provided, fail to appear at the taking of the depositions, the depositions may be taken without such party with the same force and effect as if such party were present and had examined and cross-examined the witnesses, provided that if any party shall be unable to reach Tel-Aviv by the 29th day of August, 1955 due to failure of pre-arranged transportation which but for such failure would have resulted in the party's timely presence in Tel-Aviv, then upon notice of such failure of transportation cabled to the Hotel Dan in Tel-Aviv, the taking of the depositions shall be postponed until the arrival of the delayed participants, but such delay shall in no event exceed three days.

6. Subject only to the Court's rulings on objections raised to questions and on motions to strike answers, any party hereto shall have the right to read into evidence the testimony of the witnesses or any of them taken as aforesaid in any action or proceeding in the State of New York and the State of Florida involving the distribution of the estate of JACOB TIM or in which the status of

the respondents as distributees may be in issue; with the same force and effect as if the witnesses testified in person at the trial of such action or proceeding.

7. Upon (1) the approval of this stipulation by the County Judges' Court in and for Dade County, Florida and the Surrogate of the County of New York, and (2) upon the entry of an order of the County Judge's Court in and for Dade County, Florida, directing the taking (for use in the Florida courts) of the said depositions on the terms and conditions herein provided, the stipulation dated January 28, 1955 settling, subject to the approval of said Courts, the action brought in the Supreme Court, County of New York, by the CHASE NATIONAL BANK OF THE CITY OF NEW YORK (now the CHASE MANHATTAN BANK), as plaintiff, against ARTHUR J. McQUADE, as Administrator of the Estate of JACOB TIM, DAVID ELMER WARD as Administrator of the Estate of JACOB TIM, in the State of Florida, and J. T. CORPORATION, as defendants, shall be deemed approved and consented to in its entirety by the parties; and the answer of the respondents to the Public Administrator's petition verified the 29th day of April, 1955, as well as the objections of the respondents to the Florida Administrator's petition to the County Judge's Court in and for Dade County, Florida, shall be deemed withdrawn.

Upon the approval thereafter of said stipulation dated January 28, 1955 by the County Judge's Court in and for Dade County, Florida, and the Surrogate of the County of New York, this stipulation shall immediately become binding on all the parties hereto.

7-a. It is expressly understood and agreed that unless both the Surrogate of the County of New York and the said County Judge's Court make orders directing the taking of the depositions on the terms herein stated and approving this stipulation and the said stipulation dated January 28, 1955 this stipulation shall be of no force and effect.

8. The expenses connected with the taking of the despositions shall be borne equally by the New York and Florida funds:

Upon the approval of this stipulation by the said Surrogate, the entry of the order referred to in paragraph 7 hereof, and the approval of said Surrogate and of said County Judge's Court of the stipulation dated January 28, 1955 hereinabove mentioned, there shall be withdrawn from the account of the estate of JACOB TIM in the CHASE MANHATTAN BANK by the joint check of the Public Administrator of New York County and the Florida Administrator the sum of $14,000, which sum shall be deposited in a joint bank acount to the credit of the Public Administrator of New York County and the Florida Administrator, the funds of which shall be payable on the joint signatures of ARTHUR J. McQUADE, Public Administrator of New York County, or JOSEPH T. ARENSON, his attorney, and DAVID ELMER WARD, the Florida Administrator, or DOYLE E. CARLTON, his attorney. From the said amount there shall be paid out to each of the aforementioned persons participating in the taking of the depositions in advance of their departure for Israel the sum of $1,600.00 for traveling expenses and

expenses of stay in Israel for the purpose of taking of the depositions. Out of the balance remaining after these payments there shall be paid the expenses incident to the execution of the commission, i.e., stenographers' fees for transcription of the testimony, travel expenses of the stenographer not to exceed $750, interpreter's fees, and the expense, if any, of a room where the depositions shall be taken. If after the payment of all these expenses there should remain an unexpended balance of the said $14,000.00, one-half of said balance shall be added to the assets of the estate administered by the Florida administrator and one-half to the assets administered by the Public Administrator of New York County.

9. The assets in the hands of the Florida Administrator shall not be liable for any fees or allowances to any of the New York attorneys or said Special Guardian participating in the taking of the depositions, and the assets in the hands of the Public Administrator of New York County shall not be liable for any fees or allowances to the Florida attorneys participating in the taking of the depositions.

9-a. The fees of the attorney representing DAVID ELMER WARD, Florida Administrator, in the proceedings in the Surrogate's Court, County of New York, for their services in attending and participating in the taking of the aforesaid depositions shall be $250 per day, but not exceeding in all a total of ten days, including the number of days required in traveling to and from Israel, and said fees shall be paid out of the assets in the hands of the Florida Administrator.

10. The consent to this stipulation in the Florida proceedings by the Public Administrator of New York County and any other party hereto shall not, by virtue thereof, be deemed to be a general appearance or submission generally to the jurisdiction of the Florida courts, but it is expressly agreed that the same shall be a special and limited appearance for the purposes only of obtaining approval of the said stipulation of January 28, 1955 and the issuance and execution of the aforesaid commission; and the consent, if any, to this stipulation in the New York proceeding by the Florida Administrator and any other party hereto shall not, by virtue thereof, be deemed to be a general appearance or submission generally to the jurisdiction of the New York courts, but it is expressly agreed that the same shall be a limited and special appearance for the purposes only of obtaining approval of the said stipulation of January 28, 1955 and the issuance and execution of the aforesaid commission.

11. A duplicate original copy of this stipulation shall be filed in the instant proceeding, as well as in the Florida proceeding for approval thereof and of the aforesaid stipulation of January 28, 1955.

Dated: New York, June 30, 1955.

JOSEPH T. ARENSON
/s/ Joseph T. Arenson
Attorney for Acting Public Administrator of New York County, as Administrator of the Estate of Jacob Tim, deceased.

/s/ Newman, Hauser & Teitler, New York attorneys for David Elmer Ward, Florida Administrator of the Estate of Jacob Tim, deceased.

LAZARUS JOSEPH

/s/ Lazarus Joseph, Special Guardian for Unknown Distributees.

/s/ Mae T. Korn by Thomas Field, Attorney for Respondents Jacob Timiansky, Zorah Timiansky, Liza Kahane and Fishel Rudawski.

"No objection"

JACOB K. JAVITS /s/ JKB Jacob K. Javits, Attorney General of the State of New York.

APPENDIX B

734.25 Determination of beneficiaries.—

(1) Whenever property passes by the laws of descent and distribution or under a will to a person not sufficiently indentified in such will, and the personal representative is in doubt as to who is entitled to receive said property, or any part thereof, or if he is in doubt as to shares and amounts which any person is entitled to receive, such personal representative may file with the county judge of the court out of which his letters were issued, his sworn petition setting forth the names, residences and post-office addresses, so far as known or ascertainable by diligent search and inquiry, of all persons in interest, except creditors of the decedent or the estate, and the nature and character of their respective interests and claims so far as known, designating those who are believed by him to be minors or non compos mentis, and stating whether those so designated are under legal guardianship in this state. If the personal representative believes that there are or may be persons who have claims against or interest in such estate as next of kin, distributees, legatees or beneficiaries whose names are not known to him, the petition shall so state.

(2) Upon the filing of such petition, the county judge shall appoint a guardian or guardians ad litem if necessary and shall issue a citation to all claimants and persons in interest whose names are set forth in said petition.

(3) If said petition sets forth that there are or may be persons whose names are not known who have claims against or interests in such estate, citation shall be published, directed to all persons claiming any beneficial interest in the estate of such decedent. Such publication of citation may also include all persons whose names are known and set forth in said petition but who cannot be personally served.

(4) After a hearing upon such petition and defenses thereto and upon such testimony and evidence as may be produced before the court, the county judge shall make and enter an order finding and adjudging who are entitled to such property and the shares and amounts which they, respectively, are entitled to receive. Any personal representative who makes distribution or takes any other action pursuant to such an order shall be fully protected thereby.

(5) Whenever it is necessary to determine who are or were the heirs, legatees or devisees of a deceased person, on the petition of any interested party or like proceedings, the county judge may make a determination thereof, irrespective of whether the estate of such deceased person is administered, or if administered, whether the administration of the estate has been closed or the personal representative discharged.

History.—§182, ch. 16103, 1933; CGL 1936 Supp. 5541(134); am. §4, ch. 22783, 1945.